(7)

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 03-1693

In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, et al.,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MINNESOTA, MISSOURI, ILLINOIS, IOWA, NEW MEXICO, OKLAHOMA, AND WISCONSIN *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

JOHN S. GARRY
Assistant Attorney General

445 Minnesota Street
Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5700

Attorneys for Amici Curiae States

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

LISA MADIGAN
Attorney General
State of Illinois

THOMAS J. MILLER
Attorney General
State of Iowa

PATRICIA A. MADRID
Attorney General
State of New Mexico

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

PEGGY A. LAUTENSCHLAGER
Attorney General
State of Wisconsin

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* STATES 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. A Depiction Of The Ten Commandments In A Courthouse Setting In Conjunction With Other Historical Symbols Of The Legal System Does Not Violate The Establishment Clause Under The *Lemon* Test 2

A. A Courthouse Display Of Historical Legal Symbols That Includes The Ten Commandments Does Not Lack A Secular Purpose 5

B. The Primary Effect Of Such A Display Neither Advances Nor Inhibits Religion Because A Reasonable Observer Would Not Perceive The Display As An Endorsement Of Religion 7

C. A Courthouse Display That Includes The Ten Commandments Does Not Foster Excessive Governmental Entanglement With Religion 9

D. Affirming The Court Of Appeals Would Cast Doubt On The Constitutionality Of Longstanding Displays That Include Depictions Of The Ten Commandments At State And Federal Courthouses 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

ACLU v. McCreary County, 354 F.3d 438 (6th Cir. 2003) 5, 7, 9, 10

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ...6, 7, 8, 11

Edwards v. Aguillard, 482 U.S. 578 (1987) 6

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 4

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Lynch v. Donnelly, 465 U.S. 668 (1984) ..... *passim*

Santa Fe Indep. Sch. Dist. v. Doe, 503 U.S. 290 (2000) 4, 5

Stone v. Graham, 449 U.S. 39 (1980) 5, 6

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 9

CONSTITUTIONAL PROVISIONS

United States Constitution, Establishment Clause ..... *passim*

INTEREST OF THE *AMICI CURIAE* STATES

This case concerns the constitutionality under the Establishment Clause of a depiction of the Ten Commandments at a courthouse as part of a display of other historical documents that symbolize the development of law. The State of Minnesota has an interest in the resolution of this issue because the courtroom of the Minnesota Supreme Court in the Minnesota State Capitol includes a depiction of the Ten Commandments in a group of murals that symbolize concepts of the legal system. The State of Missouri has an interest because there are courthouses in Missouri displaying similar symbols. The States of Illinois, Iowa, New Mexico, Oklahoma, and Wisconsin have a like interest. Affirming the decision of the Sixth Circuit Court of Appeals could call into question the constitutionality of Minnesota's display of courtroom murals, and similar displays in Missouri, as it could for other such displays that include depictions of the Ten Commandments at numerous courthouses across the country.

SUMMARY OF ARGUMENT

A depiction of the Ten Commandments in a courthouse setting does not violate the Establishment Clause when it is part of a display of other historical symbols of the legal system. Such a display does not violate the Establishment Clause because it satisfies each of the three prongs of the prevailing test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). There is a secular purpose for such a display; a reasonable observer would not understand such a display to be a government endorsement of the religious aspect of the Ten Commandments; and such a display does not foster excessive

governmental entanglement with religion. The contrary decision of the Sixth Circuit rests on a misapplication of this Court's precedents under the *Lemon* test. The Court should reject the Sixth Circuit's faulty reasoning and remove the doubt it creates for the continuation of displays such as that in the courtroom of the Minnesota Supreme Court.

ARGUMENT

I. A Depiction Of The Ten Commandments In A Courthouse Setting In Conjunction With Other Historical Symbols Of The Legal System Does Not Violate The Establishment Clause Under The *Lemon* Test.

This case requires the Court to determine whether including a depiction of the Ten Commandments in a courthouse display of historical symbols of law violates the Establishment Clause. Like many other courthouses throughout the country, the courtroom of the Minnesota Supreme Court in the Minnesota State Capitol building includes a depiction of the Ten Commandments. The building, designed by architect Cass Gilbert who also designed the United States Supreme Court building, was opened to the public in 1905. *Minnesota State Capitol, Self-guided Tour*, produced by Minnesota Historical Society, available at *http://www.mnhs.org/statecapitol*. On the walls of the courtroom of the Minnesota Supreme Court, located in the east wing of the second floor, are large mural paintings by John LaFarge that "symbolize concepts of the legal system." *Id.* The paintings are described as follows by the Court Information Office of the Minnesota Supreme Court:

> Toward the ceiling of the chambers are four paintings by artist John LaFarge, each one symbolizing a concept of the legal system. Above the justices' bench is pictured Moses receiving the law of the Ten Commandments. It is called "The Moral and the Divine Law." The painting to the left is called "The Recording of Precedents" and shows the Chinese philosopher Confucius and his documenting of canons and charges in the course of Chinese history. The Greek philosopher Socrates can be seen above the entrance as he uses his Socratic method of questioning to elicit answers from his pupils, the same technique often used by the justices in asking questions of the attorneys before them. The painting is called "The Relation of the Individual to the State." The painting on the right side is called "The Adjustment of Conflicting Interests," and shows medieval lords meeting with church representatives in an attempt to resolve their differences peacefully, a function that later became the role of the courts.

Minnesota Supreme Court, at pp. 12-13, produced by Court Information Office, available at *http://www.courts.state.mn.us/page/?pageID=149*.

Courthouses in Missouri display similar symbols. For example, the lobby of the courthouse for the Missouri Court of Appeals, Western District, in Kansas City, built in 1982, contains a large ornamental frieze. One element is an image of stone tablets without any writing. Similar unmarked tablets appear on the other side of the state, above the exterior doors of the Civil Courts Building for the City of St. Louis. The building, constructed in 1930, also has unmarked tablets above the doors to two courtrooms on each floor, and tablets in the lobby that are

marked with Roman numerals I through X – an obvious reference to the Ten Commandments. Elsewhere in the building are other images, such as the roof decoration: two 12-foot-high griffins, with human faces that symbolize human mercy tempering justice.

The governing test under the Establishment Clause for the constitutionality of such displays, like the LaFarge courtroom murals at the Minnesota State Capitol, remains the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The test has not been abandoned. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying *Lemon* test); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993) (noting that *Lemon* has not been overruled).

Under the *Lemon* test, a challenged governmental action violates the Establishment Clause if: (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it fosters excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The decision of the Sixth Circuit Court of Appeals in this case employs reasoning that misapplies this Court's decisions under the *Lemon* test. A courthouse display that includes a depiction of the Ten Commandments with other historical symbols of law does not violate the Establishment Clause under a proper application of the *Lemon* test. Thus, to decide this case, the Court need not overrule its precedents or formulate a new Establishment Clause test that provides for a different or less exacting review.

A. A Courthouse Display Of Historical Legal Symbols That Includes The Ten Commandments Does Not Lack A Secular Purpose.

The court of appeals erred in holding that a courthouse display that includes the Ten Commandments fails the first prong of the *Lemon* test if the display lacks information demonstrating an "analytical or historical connection" between the Ten Commandments and the other legal documents or symbols of law in the display. *ACLU v. McCreary County*, 354 F.3d 438, 451 (6th Cir. 2003). This holding misapplies the Court's precedents and, in so doing, wrongly casts doubt on the constitutionality of the many other courthouse displays that include the Ten Commandments, such as the LaFarge murals in the courtroom at the Minnesota State Capitol building.

The first prong of the *Lemon* test sets a fairly low hurdle. *See Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). It requires only that at least one secular purpose exist for the challenged governmental action. *See id.* at 681 & n.6. The Court accords deference to the government's asserted secular purpose and, accordingly, will find that the challenged governmental action fails the *Lemon* test's first prong only if the asserted secular purpose is a sham. *See Santa Fe*, 530 U.S. at 308-09, 314-17; *see also Lynch*, 465 U.S. at 680 (stating that, under the *Lemon* test, the Court concludes that governmental action has no secular purpose only when there is no question that the action "was motivated wholly by religious considerations").

For its holding that the challenged display lacks a secular purpose, the court of appeals relied heavily on the inapposite case of *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*). That decision is inapplicable here because it

struck down a state statute that required the Ten Commandments to be posted, by itself, on the wall of every public school classroom. *Id.* Posting the Ten Commandments by itself on classroom walls could be understood only as having the purely religious purpose of seeking "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments." *Id.* at 42; *see also Lynch*, 465 U.S. at 679 (stating that the Court invalidated the challenged statute in *Stone* because the Commandments were posted in a school setting "purely as a religious admonition"). This is far different than a display that includes many historical legal symbols, not just the Ten Commandments, and that is presented at a courthouse, rather than in a school setting where Establishment Clause concerns are much stronger. "Indeed, the Court acknowledged in *Stone* that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987); *see also id.* at 583-84 (stating that "[t]he Court has been particularly vigilant monitoring compliance with the Establishment Clause in elementary and secondary schools" because "[s]tudents in such institutions are impressionable and their attendance is involuntary").

The relevant cases are *Lynch* and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), in which the Court applied the *Lemon* test to displays that were on public space outside the school setting and included purely secular symbols with a religious symbol. In these cases, the Court rejected Establishment Clause challenges to the inclusion of a religious symbol as part of the broader display, without

any requirement that the display present an explanation demonstrating the connection that the religious symbol had with the other symbols. *See Lynch*, 465 U.S. 668 (crèche); *Allegheny*, 492 U.S. 573 (menorah). Thus, contrary to the court of appeals' decision, a courthouse display of historical legal symbols that includes a depiction of the Ten Commandments does not fail the first prong of the *Lemon* test if it lacks an explanation of the "analytical or historical connection" between this religious symbol of law and the secular symbols of law.

B. The Primary Effect Of Such A Display Neither Advances Nor Inhibits Religion Because A Reasonable Observer Would Not Perceive The Display As An Endorsement of Religion.

Because of the low hurdle presented by the first prong of the *Lemon* test, the determinative question is whether the challenged display fails under the second part of the test, the "effect" prong. Only one of the judges in the majority of the court of appeals panel addressed this part of the test. *See McCreary*, 354 F.3d at 462 (Gibbons, J., concurring) (expressing no opinion on whether the challenged display violates second prong of *Lemon* test). The opinion of Judge Clay on this issue erred in concluding that the challenged display fails the effect prong because it does not demonstrate an "analytical connection" between the Ten Commandments and the other documents in the display. *Id.* at 460. As is clear from the Court's decisions addressing displays on public property, the *Lemon* test's second prong does not require that such a courthouse display present an "analytical connection" in order to pass constitutional muster.

In the context of displays of religious symbols on public property, the Court has refined the second prong of the *Lemon* test by clarifying that this "effect" prong is violated only if the display constitutes an endorsement of religion. *See Allegheny*, 492 U.S. at 592-97; *Lynch*, 465 U.S. at 687, 691-94 (O'Connor, J., concurring). The display is an endorsement of religion only if it would be perceived as such by a reasonable observer. *See id.* Under this objective standard, a reasonable observer is one who is already familiar with the history and context of the display, without that information being presented as part of the display itself. *See id.*; *see also Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment) (stating that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion"). Thus, contrary to the approach taken by Judge Clay, the second prong of the *Lemon* test does not require that a challenged display provide the explanatory "analytical connection" envisioned by his opinion.

A reasonable observer with an understanding of history and context would not perceive a courthouse display of historical legal symbols that includes the Ten Commandments to be a government endorsement of religion in general or a government endorsement of the religious meaning of the Ten Commandments for the Jewish and Christian faiths. This is confirmed by the continuous display of the LaFarge murals in the courtroom of the Minnesota Supreme Court since 1905 without any Establishment Clause challenge. It is likewise confirmed by this Court's express approval of the inclusion of

a depiction of Moses and the Ten Commandments on a frieze in its courtroom. *See Lynch*, 465 U.S. at 677 ("The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with Ten Commandments.").

C. A Courthouse Display That Includes The Ten Commandments Does Not Foster Excessive Governmental Entanglement With Religion.

The district court and the court of appeals did not address whether the challenged display violates the third prong of the *Lemon* test. *McCreary*, 354 F.3d at 461 n.11. There is no plausible argument that such a display fails the third prong of the *Lemon* test.

A courthouse display of historical legal symbols that includes the Ten Commandments simply does not give rise to the excessive governmental entanglement with religion proscribed under the *Lemon* test. Erecting and maintaining such a display does not involve the expenditure of public funds to support a religious organization. Nor does it otherwise involve the government with a religious program or authority. *See Lemon*, 403 U.S. at 612 (stating that "the three main evils against which the Establishment Clause was intended to afford protection [are] 'sponsorship, financial support, and active involvement of the sovereign in religious activity'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

D. Affirming The Court Of Appeals Would Cast Doubt On The Constitutionality Of Longstanding Displays That Include Depictions Of The Ten Commandments At State And Federal Courthouses.

Given its faulty reasoning, affirming the court of appeals would place in doubt the constitutionality of other courthouse displays that include the Ten Commandments and have stood for decades without being challenged, such as the LaFarge murals in the courtroom of the Minnesota Supreme Court. As the dissent correctly noted:

> It is uncontested that depictions of the Ten Commandments and Moses appear in secular context in, among other places, the United States House chamber, the entrance to the national archives, and in three separate locations in the United States Supreme Court, as well as numerous courtrooms and legal settings across the country.

McCreary, 354 F.3d at 481-82 (Ryan, J., dissenting). Under the court of appeals' erroneous reasoning, such longstanding displays in Minnesota and elsewhere would be at risk of a challenge that they lack a secular purpose or constitute an endorsement of religion on the ground that the display does not present sufficient information demonstrating an analytical or historical connection between the depiction of the Ten Commandments and the other symbols in the display.

The *Lemon* test, when properly applied, does not expose such longstanding courthouse displays, like the LaFarge murals in the Minnesota State Capitol building, to a viable Establishment Clause challenge. As Justice

Stevens aptly stated in discussing the frieze on the south wall of the courtroom of the United States Supreme Court:

> [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part) (citations and footnote omitted).

Thus, the Court should reject the court of appeals' reasoning and confirm that the Establishment Clause, as articulated in the *Lemon* test and the Court's decisions applying that test, does not require depictions of the Ten Commandments to be excised from courthouse displays of historical symbols of law.

CONCLUSION

The Court should conclude that, under the existing *Lemon* test, a depiction of the Ten Commandments in a courthouse setting does not violate the Establishment Clause when displayed in conjunction with other historical symbols of the legal system.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota
Counsel of Record

JOHN S. GARRY
Assistant Attorney General

445 Minnesota Street
Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5700

Attorneys for Amici Curiae States

Dated: December 8, 2004